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May 7, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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202-857-2900

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: MM No. 93-41
Triad Family Network, Inc.

Dear Ms. Searcy:

Transmitted herewith on behalf of Triad Family Network, Inc., are an original and six (6) copies of its Supplement to Opposition to Petition for Leave to Amend.

Should any questions arise concerning this matter, kindly communicate with the undersigned.

Very truly yours,

Lee J. Peltzman APC
Lee J. Peltzman
Counsel for
TRIAD FAMILY NETWORK, INC.

Enclosures

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Before The
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D. C. 20554

MAY - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In re Applications of

TRIAD FAMILY NETWORK, INC.
 Winston-Salem, North Carolina
 Channel 207C3

POSITIVE ALTERNATIVE RADIO, INC.
 Asheboro, North Carolina
 Channel 207A

For Construction Permit for a
 New Noncommercial Educational
 FM Station

) MM No. 93-41

) BPED-910227MD

) BPED-911119MC

To: Administrative Law
 Judge Joseph P. Gonzalez

SUPPLEMENT TO
OPPOSITION TO PETITION FOR LEAVE TO AMEND

SHAINIS & PELTZMAN
 Suite 500
 1255 23rd Street, N. W.
 Washington, D. C. 20037
 202-857-2946

May 7, 1993

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SUMMARY

Radio lacked reasonable assurance with respect to its proposed site at the time it filed its application and thereafter. Triad has supplied the Sworn Statement of Edward Swicegood, President of Randolph Broadcasting, Inc., licensee of WKXR(FM), owner of Radio's proposed site, and the individual with whom Radio principal, Vernon Baker, communicated with Mr. Swicegood expressly states that no formal or informal understanding existed regarding use by Radio of the WKXR site. There never was any meeting of the minds with respect to leasing space on the WKXR tower. In view of the fact that Radio lacked reasonable assurance at the time it filed its application, its subsequent site amendment cannot be accepted and its Petition for Leave to Amend must be denied.

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Washington, D. C. 20554
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In re Applications of)	MM No. 93-41
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Asheboro, North Carolina)	
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For Construction Permit for a)	
New Noncommercial Educational)	
FM Station)	

To: Administrative Law
Judge Joseph P. Gonzalez

SUPPLEMENT TO
OPPOSITION TO PETITION FOR LEAVE TO AMEND

Triad Family Network, Inc. ("Triad"), by its attorneys, hereby supplements its Opposition to that Petition for Leave to Amend filed by Positive Alternative Radio, Inc. ("Radio"). In support of its position, the following is submitted:

BACKGROUND

On March 17, 1993, Radio filed a Petition for Leave to Amend in which it specified a new transmitter site. An earlier Petition for Leave to Amend, filed prior to the designation of Radio's application, was denied by the Commission in its Hearing Designation Order ("HDO") initiating this proceeding. DA 93-223, released March 9, 1993. The Commission specifically considered therein the question of whether Radio had made a sufficient good

Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970).

Radio subsequently petitioned for reconsideration of the HDO and also filed a Petition for Leave to Amend with the Presiding Officer specifying a new site. Radio attempted to establish good cause in support of its site change amendment. It stated that, prior to filing its application, one of its principals, Vernon H. Baker, had spoken with Edward F. Swicegood, President of Randolph Broadcasting, Inc., licensee of Station WKXR, Asheboro, North Carolina, about a proposal for Radio to use a WKXR tower. According to Radio, "Swicegood readily agreed to use of his North Tower as outlined by Baker."^{1/} Although the subject of a reasonable site charge was admittedly not broached, Baker assumed that Radio would be charged in the area of \$150 to \$200 per month for tower space. One year later, around December 15, 1992, Radio claimed that Baker received a letter from Swicegood "demanding 'out of a clear sky' tower use payments of \$1,200.00 per month and \$14,400.00 advance payment by December 20th, and requiring that there be no refunds."^{2/} Radio stated further that Baker was "shocked" to receive Swicegood's letter, which indicated to Radio that Swicegood had "changed his mind and determined to deny Radio the use of his tower as a site."^{3/} According to Radio, as a result of Swicegood's position, should the licensing proceeding extend

^{1/} See Radio Petition for Reconsideration, filed March 15, 1993, at p. 2.

^{2/} Id. at pp. 3-4. See also Radio Petition for Leave to Amend, filed March 17, 1993, at p. 4.

^{3/} Petition for Leave to Amend at p. 5.

over two or three years, it would mean that Radio would have to pay Swicegood "up to nearly \$50,000.00."^{4/} Radio continued that, "upon receipt of Swicegood's [December 15] demand letter. . .Radio's principals immediately sought a new site"^{5/} and sought to amend Radio's application.

Triad filed an Opposition to Radio's Petition for Leave to Amend as well as an Opposition to Radio's Petition for Reconsideration. Triad opposed Radio's petitions on numerous grounds, including a strong objection to Radio's assertion that there was good cause present for acceptance of its amendment under the Erwin O'Conner test. Triad took specific issue with Radio's declaration that Edward Swicegood had given reasonable assurance to Vernon Baker for use of the WKXR site.

Triad demonstrated that Radio had not satisfied the Commission's good cause test for post-designation amendment -- specifically, that there had never been a meeting of the minds between Baker and Swicegood.^{6/} And, since Radio did not have reasonable assurance at the time that it filed its application, it

^{4/} Petition for Leave to Amend at p. 4; Petition for Reconsideration at p. 5, n. 4 and p. 8.

^{5/} Petition for Reconsideration at p. 4.

^{6/} Triad pointed out that Radio's engineering was dated prior to the date that Baker contacted Swicegood to obtain reasonable assurance. Triad reached the inescapable conclusion from this that Radio's engineering had been prepared prior to that Sunday (the filing deadline was the following Wednesday, November 19, 1991), and that Radio was in the position of having to use Swicegood's site (with or without reasonable assurance) or have its application dismissed for lack of a site. Triad Opposition to Petition for Reconsideration, dated March 30, 1993, at pp. 5-6.

had no right to file a curative amendment.

Replying to Triad's Opposition, Radio argued vigorously that Radio had always had reasonable assurance for use of the WKXR site and that there had been a meeting of the minds between Swicegood and Baker.^{7/} Radio also argued that Triad was incorrect in its conclusion that Radio had its consulting engineer prepare the technical portion of its application, and only then sought assurance for use of its specified site, calling the charge "preposterous and absurd."^{8/} Radio proclaimed that "it should have been obvious to Triad that Baker's letter of November 16, 1991, was not the first contact between him and Swicegood, but amplified a previous conversation [prior to that date] when Swicegood provided reasonable assurance to Baker that Radio might locate its antenna on one of the WKXR towers."^{9/}

Radio also made light of the fact in its Reply that Triad had failed to produce a letter from the site owner, Edward Swicegood, stating that there was no meeting of the minds, as claimed by Radio.^{10/}

^{7/} Radio based its claim on two facts: (1) Baker wrote Swicegood a self-serving letter on November 16, 1991, and referred to their earlier conversation (from that day) about use of a site, and (2) Swicegood apparently agreed to let Radio place its public files at WKXR. See Radio Opposition to Petition for Reconsideration at pp. 3-4.

^{8/} Radio Opposition to Petition for Reconsideration at p. 4.

^{9/} Id.

^{10/} Radio's Reply to Opposition to Petition for Leave to Amend, filed April 5, 1993, at p. 4 ("If Triad will now claim that Radio lacked site assurance, why has it not attached a statement from Mr. Swicegood that he never intended to make his tower

ARGUMENT

Radio's claim of reasonable assurance is misleading and otherwise at odds with the truth. Attached hereto is a Sworn Statement by Edward Swicegood, President and General Manager of Randolph Broadcasting, Inc., licensee of Station WKXR (AM), owner of Radio's proposed site, which Radio has only recently received. Mr. Swicegood repeatedly contradicts Radio's recitation of those events culminating in Radio's certification to the Commission that it had reasonable assurance regarding its proposed site as well as those events leading to Radio's Petition for Leave to Amend specifying a new transmitter site. See Attachment A.

Mr. Swicegood states that he received a telephone call on a Sunday evening in November, 1991, from Vernon Baker. Baker told Swicegood that he needed to make reference to a transmitter site in an application which he planned to file at the Commission and that he was in a hurry. According to Mr. Swicegood, Baker told him that he needed an answer that night to give to his engineer the next day, since the filing deadline was that upcoming Wednesday. Contrary to Radio's claim, Swicegood relates that this was the first contact between Baker and Swicegood regarding use of the WKXR tower site.^{11/}

Mr. Swicegood told Baker that he needed to check with his engineer and lawyers, and other company principals, and that he could not give him an answer at that time since he was not sure.

available, and that there was no meeting of the minds, etc.?").

^{11/} Attachment A at p. 1.

Mr. Swicegood's statement directly conflicts with Radio's claim that "Swicegood readily agreed to use of his North tower as outlined by Baker."^{12/}

According to Mr. Swicegood, Baker repeated several times that his true interest was in having a site for purposes of filing his application so that he could claim reasonable assurance. After a lengthy conversation, Mr. Swicegood told Baker that he would "consider" trying to work something out with him in the future, but no understanding was reached. No terms were agreed upon and Baker never offered Swicegood any money to keep the site available to

declares that his conversation with Baker on that Sunday was the "only conversation I had with Baker regarding his need to list my site in his application until I spoke with him one year later."^{16/}

From time to time during the next year, Baker communicated with Swicegood regarding his request that he be allowed to place his public files at the WKXR studios. Swicegood agreed to this but did not consider it related to use of WKXR's transmitter site.^{17/}

Mr. Swicegood's Sworn Statement also contradicts Radio's explanation as to the need for it to amend. Radio has claimed that Baker received a letter from Mr. Swicegood in mid-December, 1991, demanding "out of a clear sky" tower payments of \$1,200.00 per month. A review of Mr. Swicegood's Statement reveals that Radio has told something less than the whole truth.

Mr. Swicegood states that in September, 1992, he received a letter from Baker containing information regarding Radio's proposed FM station. At that point, Swicegood spoke with counsel and informed him that no agreement had been sent to him and, additionally, that no understanding had been reached regarding use of the WKXR tower during the preceding year. Because Radio had never provided Swicegood with any proposed agreement containing essential terms during the prior year, Mr. Swicegood wrote Baker on November 13, 1992, requesting a proposal from Radio and setting a deadline of 30 days. According to Mr. Swicegood, he did not know whether Radio even desired his site for anything other than being

^{16/} Attachment A at p. 2.

^{17/} Id.

able to represent in an application that a site was available. Mr. Swicegood states that it was his "impression at that time that we did not have a formal or even informal understanding regarding Mr. Baker's use of my tower."¹⁸/

In response, Baker wrote back to Swicegood but ignored Mr. Swicegood's request that he make a lease proposal. It was only after receiving Baker's proposal which did not include a rental amount that Mr. Swicegood, along with a WKXR business associate, came up with his lease proposal to Baker. Baker met with Mr.

Dr. Baker responded that he would need to talk to his other principals about the offer. One week later, Baker called Mr. Swicegood and stated that he was working with his lawyer but needed additional time to respond to Mr. Swicegood's offer. He requested until January 4, 1993, to respond. On January 6, two days after the date which Baker had requested, Mr. Swicegood sent a letter to Baker stating that since he had not heard from him by Baker's requested deadline, he had concluded that Radio no longer had an interest in the site and that the matter was closed. A week later, Baker stated to Mr. Swicegood that he had located another site for Radio's application and that he expected that the Commission would allow him to change sites. Two months later, during the second week of March, 1993, after the Commission had refused to accept Radio's pre-designation Petition for Leave to Amend, Baker called Mr. Swicegood and asked him if he would reconsider his position. In view of preceding events, Mr. Swicegood answered in the negative. Baker did not inform Mr. Swicegood at that point that the Commission had previously failed to accept Radio's amendment in the HDO.

As noted, a review of Swicegood's Sworn Statement establishes several facts. First, contrary to Radio's statements in its Petition for Leave to Amend and subsequent pleadings filed with the Commission and the Presiding Judge, Radio never had reasonable assurance that its proposed site was available. While an applicant need not have a binding agreement or absolute assurance, a mere possibility, assumption, or hope that the site will be available

will not suffice. See 62 Broadcasting, Inc., 4 FCC Rcd. 1768, 1773
(Rev. Bd. 1989); Shoblom Broadcasting, Inc., 93 FCC 2d 1027 and 95
FCC 2d 444 (Rev. Bd. 1985) (remainder of cite omitted). An
applicant cannot merely have vague discussions with a site owner,

Reasonable assurance requires more than a vague willingness to deal. See Progressive Communications, Inc., 61 RR 2d 560, 563 (Rev. Bd. 1986). The applicant, at the time it files its application, should have "obtained sufficient assurances in response to justify its belief that the. . .site [is] suitable and available. . ." Puopolo Communications, Inc., 60 RR 2d 964, 966 (Rev. Bd. 1986).

In this case, Radio never had reasonable assurance for the use Mr. Swicegood's site. Mr. Swicegood has stated that there never was a meeting of the minds of the involved parties regarding leasing space on the WKXR tower to Radio.^{21/} There may have been, at most, "a vague willingness to deal." However, there was never anything more than a "mere possibility" that the site would be available. Even under National Innovative, something more is required. Certainly, in view of Mr. Swicegood's Sworn Statement and Radio's own actions, it is clear that Radio never obtained sufficient assurances to justify any reasonable belief that the site in question would be available to it.

Moreover, contrary to Radio's assertion that it lost its site because the site owner (Swicegood) changed his mind and attempted to hold it up for an outrageous sum of money, it is clear that Mr. Swicegood's proposal was only made after Radio refused to negotiate with him. Mr. Swicegood never changed his mind as to key terms

^{21/} See Attachment A at p. 2 ("I did not believe that there had been any meeting of the minds with respect to our leasing space on our tower to Mr. Baker or his group."). See also Attachment A at p. 3 ("[w]e did not have a formal or even informal understanding regarding Mr. Baker's use of my tower.")

because there never was any agreement. There could be no change in position by Mr. Swicegood because Radio would never negotiate with him. Nor did Mr. Swicegood's proposal come "out of the blue" as described by Radio. It came only after Mr. Swicegood had waited, unsuccessfully, one year for a proposal to be made by Radio. Also, contrary to Radio's statement, Mr. Swicegood did not demand that Radio pay two or three year's rent in advance. To the contrary, Swicegood, on December 10, 1992, called Vernon Baker and offered to drop his request that payments be made between that date and the start of construction with the exception of the first year's rent. Finally, Radio's opinion of Mr. Swicegood's proposal is irrelevant in any event to the question of reasonable assurance. "Commission precedent indicates that a site owner unilaterally determines whether a site is available and under what terms and it is immaterial whether an applicant believes that a site owner's condition for assurance of a site are unreasonable." Intermart Broadcasting, supra, paras. 9, 11.

Radio has taken extensive liberties with the truth in its various pleadings filed at the Commission.^{22/} The Sworn Statement of Edward Swicegood places the situation in its proper context.

It is clear from Mr. Swicegood's Statement that, contrary to Radio's assertions, Triad was correct in its earlier allegation that Radio prepared its application engineering prior to contacting

^{22/} Triad is reviewing the facts with the intent of filing an appropriate Petition to Enlarge Issues with respect to Radio's apparent false certification and lack of candor in its various Commission filings.

Mr. Swicegood and that it had to scurry about at the very last possible moment prior to filing because Radio needed to point to the WKXR site in its application in order to avoid dismissal. Radio never discussed a lease price with Mr. Swicegood because it had no intention to construct at that site.^{23/}

Further proof of this fact is demonstrated by the subsequent conversation between Baker and Triad principal, Philip T. Watson. According to Mr. Watson, in a June 25, 1992, telephone conversation between Baker and himself, the purpose of which was to discuss the possibility of settling the case, Baker advised Watson that Radio intended to make its station a high power FM station directed toward Charlotte, North Carolina. Baker implied that Radio had no intention of using its present site to accomplish this improvement. See Attachment B (Sworn Statement of Philip T. Watson). Watson's recollection of the phone call is confirmed by John Hill in his Sworn Statement. See Attachment C. Moreover, as noted by consulting engineer, York David Anthony, there is no way that Radio could provide a listenable service to Charlotte, North Carolina, from its present site, since Radio's site is over 65 miles from downtown Charlotte. See Attachment D (Engineering Statement of York David Anthony).

Nor is this the only time that Radio has claimed reasonable assurance of site availability where none existed. In April, 1991,

^{23/} While Triad believes that this conclusion is correct, it is not necessary that one agree regarding the reasons for Radio's actions, since it is clear that, for whatever reason Radio listed the WKXR site, it never received reasonable assurance to use that site.

an informal objection was filed against Radio's WPVB major change application. The objection contained a statement from a site owner, Sidney A. Able, that Vernon Baker had contacted Mr. Able regarding WPVB's proposal to mount on his station's (WMJR) tower, that Able had refused to give Baker reasonable assurance that the

its application, under Commission precedent it has no right to file a curative amendment. Accordingly, its March 17, 1993, Petition for Leave to Amend must be denied.

Respectfully submitted,

TRIAD FAMILY NETWORK, INC.

By: Aaron P. Shainis
Aaron P. Shainis

By: Lee J. Peltzman ^{APs}
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Its Attorneys

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May 7, 1993

ATTACHMENT A

**SWORN STATEMENT
OF
EDWARD SWICEGOOD**

I, Edward Swicegood, state that the following statement is true and correct to the best of my personal knowledge and belief and is made under penalty of perjury.

1. I am President, General Manager, a director and 50% stockholder of Randolph Broadcasting, Inc., licensee of Radio Station WKXR(AM), Asheboro, North Carolina.

2. I received a call at home on a Sunday night in November, 1991, from an individual who identified himself as Vernon Baker. Mr. Baker told me in that telephone conversation that he needed to make reference to a transmitter site in an application for a new noncommercial educational FM radio station which he planned to file at the Federal Communications Commission ("FCC"). He indicated that he was in a hurry. He said he needed an answer that night to give to his engineer the next day, since his filing deadline was the upcoming Wednesday. This was the first time Mr. Baker had contacted me regarding using my company's tower site in his application.

3. I told Vernon Baker that I really needed to talk to my engineer, my lawyers, and my company's other stockholder, and that I could not give him an answer at that time since I was not sure. Mr. Baker repeated several times to me that he only needed to be able to represent to the FCC that he had reasonable assurance that we would try to work with him. He identified his interest as being in having a site for purposes of filing his application. He stated that in the event his station could not work at our site, or, if we did not come to any agreement as to terms, he would amend his application at the FCC to change sites after his application was filed. He continually stressed that he needed something that night to put in his application prior to filing the upcoming Wednesday.

4. After a lengthy conversation and, at Mr. Baker's urgings, I finally told him that the only assurance that I could give him would be that I would consider trying to work something out with him in the future. We did not reach an understanding as to what my company would be paid, where on the tower his FM antenna would be located, or any other issue of significance. In fact, Mr. Baker never indicated what he was willing to pay us for the use of our site. Additionally, Mr. Baker never offered my company any money in good faith to keep the site available to him. I did not believe that there had been any meeting of the minds with respect to our leasing space on our tower to Mr. Baker or his group. Rather, it was my impression from Mr. Baker's statements that his sole concern was in having a site that he could use in an application that needed to be filed within a few days of our conversation. It should be noted that our telephone conversation on that Sunday was the only conversation that I had with Mr. Baker regarding his need to list my site in his application until I spoke with him one year later. Between November of 1991 and September of 1992, Mr. Baker communicated with me regarding his request that we allow him to place his public file at our studios. I agreed to do this for him. However, we did not have any further discussions regarding terms on which we would be willing to allow him to locate an FM antenna on our tower.

5. Approximately a year later, in September, 1992, I received a short letter from Mr. Baker which contained information regarding his proposed FM station. I have attached a copy of that letter as Exhibit A. After receiving that letter, I called my attorneys about Mr. Baker's application. I informed counsel that no agreement had ever been sent to me and that no understanding had been reached during the past year. I was informed by my counsel

that, if he had been serious about going forward, Mr. Baker would have provided a written agreement to me after we had first talked and that such an agreement would have contained specific terms such as the length of the agreement, rental amount, and a commitment to hold the space available for some defined period of time.

6. The fact that Mr. Baker never provided me with any proposed agreement containing essential terms for close to a year after our conversation prompted my letter of November 13, 1992, which asked for a proposal from Mr. Baker and set a deadline of 30 days for his response. I was uncomfortable sitting in limbo, not knowing whether Mr. Baker desired my site for anything other than being able to represent to the FCC in his application that a site was available to his group. I had doubts as to whether he seriously wanted to use our site if he ever did receive a grant. I therefore wrote him and requested that, if he were really serious about constructing at our site, he send me a proposed rental agreement including a specific rent proposal. It was my impression at that time that we did not have a formal or even informal understanding regarding Mr. Baker's use of my tower. I was anxious to be able to confirm whether there ever would be any understanding between us. I have attached as Exhibit B a copy of that November 13, 1992, letter from myself to Vernon Baker.

7. On November 23, 1992, I received a reply to my November 13, 1992, letter from Vernon Baker. Mr. Baker's reply mentioned that another application had been filed and that there would be a contest between that applicant and Mr. Baker's application. A copy of that letter is attached as Exhibit C. However, Mr. Baker's letter ignored my request that he make a rent proposal. His letter contained no proposed rental dollar amount.

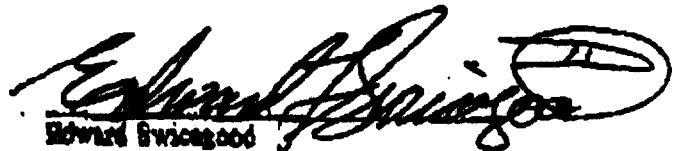
Instead, attached to it was a proposed Agreement, which omitted any reference to a specific

1993, rather than December 20, 1992 (the date mentioned in my December 9, 1992, letter), to come to a decision:

11. Not having heard from Vernon Baker by January 6, 1993, two days after the date which he himself had requested, I sent a letter to Mr. Baker stating that since I had not heard from him by his requested January 4, 1993, deadline, I had concluded that he no longer had any interest in the site and that, consequently, I considered the matter closed. A copy of that letter is attached as Exhibit H.

12. In a January 15, 1993, letter to me, Mr. Baker stated that he had located another site for his noncommercial educational FM antenna and that he expected that the FCC would allow him to change his site. A copy of that letter is attached as Exhibit P. In late January, 1993, Mr. Baker called me and confirmed that he had located another site for his proposed station. Two months later, however, sometime around March 11 or 12, 1993, Mr. Baker called me and asked me if I would reconsider our proposal to him. I told him that I would not. At that time, I was not aware that the FCC had previously failed to accept Mr. Baker's amendment. I was not aware of that FCC ruling until recently, when I was advised of this fact by my attorneys.

Executed this 28th day of April, 1993.


Edward Swicegood